BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLES A. LINDSAY Claimant	)	
VS.	)	
RANDY VILELA TRUCKING, HAULING & DEMOLITION Respondent	)	Docket No. **1,031,031**
AND	)	
NATIONWIDE MUTUAL INS. CO. **CONTINENTAL WESTERN INS. CO.** Insurance Carriers	)	
AND	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

The Kansas Workers Compensation Fund and Respondent/Continental Western Insurance Company (Continental Western) request review of the June 13, 2013, Award Upon Remand by Administrative Law Judge (ALJ) Brad Avery. Continental Western also requests review of the June 14, 2013, Order of Judge Avery denying Continental Western's Motion to Reopen Evidentiary Record. The Board heard oral argument on December 10, 2013. The Board will address both appeals in this Order.

APPEARANCES

William Phalen of Pittsburg, Kansas, appeared for claimant. Troy Unruh of Pittsburg, Kansas, appeared for Randy Vilela Trucking, Hauling & Demolition (respondent). Blake Hudson of Fort Scott, Kansas, appeared for Nationwide Mutual Insurance Co. (Nationwide). Ronald Laskowski of Topeka, Kansas, appeared for Continental Western. Kendall Cunningham of Wichita, Kansas, appeared for the Kansas Workers Compensation Fund (the Fund).

RECORD AND STIPULATIONS

The Board has considered the entire record and adopts the stipulations listed in the Award Upon Remand.

ISSUES

Claimant alleges personal injury by a series of repetitive traumas commencing in May 2006 and continuing until June 22, 2006, the last day claimant worked for respondent.

The ALJ originally entered a final Award on April 2, 2013, in which he found claimant sustained personal injury by repetitive trauma and the appropriate date of accident was October 6, 2008, approximately 16 months after claimant last worked for respondent. The ALJ awarded compensation based on a finding of a permanent total disability. The Award assessed liability against the Fund, which requested Board review.

On May 15, 2013, while the claim was pending before the Board, the parties filed a "Joint Motion of the Parties for Remand to the Administrative Law Judge," in which "the parties mutually agree, that the interest of justice would be better served by now remanding this case back to the Administrative Law Judge and providing the parties with the opportunity of adding the insurance carrier(s) for potential dates of accident between June 2006 and October 2008 to this claim, so that it can be adjudicated in an efficient manner." On May 15, 2013, the Board entered an agreed Order granting the Joint Motion "for the limited purpose as set forth in the Joint Motion . . . ."

Counsel for Continental Western entered his appearance on June 7, 2013. Less than a week later, on June 13, 2013, Continental Western filed with the ALJ a "Motion to Reopen Evidentiary Record to Allow the Party, Continental Western Insurance Company the Opportunity to Participate and be Heard." In that motion, Continental Western alleged its right to due process was violated because it: (1) received no notice regarding the pendency of the claim until after the matter was completely tried, an Award was entered and the Board remanded the claim to the ALJ; (2) received no notice of any of the previous hearings, depositions and other proceedings; and (3) because it was not provided with an opportunity to be heard and present evidence. The ALJ then entered the following decisions:

1. A June 13, 2013, Award Upon Remand, which was the same as the original Award, except: (a) Continental Western was added to the caption as a party; (b) a footnote was added acknowledging the Board's Order remanding the claim to the ALJ and the entry of appearance of counsel for Continental Western; and (c) Continental Western, rather than the Fund, was found liable to pay for all benefits awarded to claimant.

2. A June 14, 2013 Order, denying Continental Western's Motion to Reopen Evidentiary Record based on K.S.A. 44-532a, finding "[t]he defenses of the employer have

been represented by counsel throughout the litigation process leading to the issuance of an award, and therefore the insurance carrier (Continental Western) has no additional interest to defend."

Continental Western and the Fund request review of the Award Upon Remand and Continental Western requests review of the Order denying its Motion to Reopen Evidentiary Record.

The Fund requests review of the following: (1) whether claimant sustained personal injury by accident arising out of and in the course of his employment; (2) if so, the appropriate date of accident; (3) whether respondent was given timely notice of the accident; (4) whether respondent was insured on the date of accident; (5) whether the ALJ erred in awarding claimant additional temporary total disability (TTD) benefits; (6) the nature and extent of claimant's disability; and (7) whether claimant is entitled to unauthorized and future medical benefits.

In addition to the issues raised by the Fund, Continental Western raises these issues: (1) whether the ALJ erred in finding he lacked jurisdiction to decide which insurance carrier had coverage and is liable to pay for claimant's benefits; (2) whether the ALJ erred in finding written claim was timely served; (3) whether the ALJ erred in computing claimant's average weekly wage (AWW); (4) whether the ALJ erred in deciding the claim without providing Continental Western the opportunity to be heard and present evidence, thus resulting in a denial of procedural due process; and (5) whether the ALJ erred in denying Continental Western's Motion to Reopen Evidentiary Record.

Nationwide provides arguments on the issues listed above, but raises no additional issues. Nationwide's position is that its coverage lapsed at 12:01 a.m. on June 22, 2006, asserting respondent failed to timely pay the premium due under its workers compensation policy. Accordingly, Nationwide contends it did not have coverage on claimant's accident date.

The issues for the Board's determination are:

1. Did claimant sustain personal injury by repetitive trauma arising out of and in the course of his employment?

2. If so, what was the appropriate date of accident?

3. Was respondent given timely notice of the accident?

4. Was written claim timely served?

5. Was respondent insured on the date of accident?

6. What is the nature and extent of claimant's disability?

7. Is claimant entitled to additional TTD?

8. Did the ALJ err in computing claimant's AWW?

9. Is claimant entitled to unauthorized and future medical benefits?

10. Did the ALJ err in not deciding the issue of whether Nationwide provided insurance coverage on the alleged date of accident?

11. Is Continental Western entitled to a reasonable opportunity to be heard and present evidence?

12. Should the evidentiary record be reopened to allow Continental Western the opportunity to be heard and present evidence?

FINDINGS OF FACT

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

Claimant started working for respondent in May 2006 as a general laborer. Claimant's job required forceful and repetitive use of his upper extremities performing such duties as hammering, pulling nails, shoveling, raking, jack hammering and loading trucks. Claimant last worked for respondent at approximately noon on June 22, 2006. Claimant worked for respondent for a total of approximately five weeks. Claimant testified he stopped working for respondent because his neck and hands were hurting and he needed to see a doctor. Claimant has not engaged in substantial gainful employment since June 22, 2006.

Claimant obtained his GED in 1966 and later received a certificate in vocational welding in 1978. He also received certificates in personnel management and legal research and training to be a barber.

Claimant began experiencing pain, numbness and tingling in his hands and arms on the first day he worked for respondent. Claimant first worked for respondent at the South Joplin Apartments project[1] and his pain continued every day he continued to work. Claimant testified:

[1] This demolition project is also referred to in the record as the North Joplin Apartments, the Scott Joplin Apartments or simply the Joplin Apartments.

> Q. Did the pain stay about the same throughout the period of your working or did it get worse as you went along?
>
> A. While I was working the pain was constant, but it had different degrees of it.
>
> Q. Okay. And can you explain to me what you mean by different degrees?
>
> A. Uh, the different degrees, because when I would complain about it they would move me from that job and try to give me something not as strenuous, and so the symptoms would go down a little bit, subside a little bit.
>
> Q. All right. And then would they put you back on the same type work where the symptoms would come back.
>
> A. Yes.[2]

Claimant testified the symptoms in his hands and arms worsened as he continued working for respondent.

Claimant testified he repeatedly told his supervisor/foreman, who claimant referred to as "Big John,"[3] and part-owners, Johnny Vilela and Randy Vilela, that he was experiencing symptoms in his hands and arms. Claimant made it clear he associated his symptoms with his job duties. Respondent removed claimant from the South Joplin Apartments project to do ground or "dirt" work at the St. Mary's school project, which was generally less strenuous than the demolition work. Claimant testified he was able to do the ground work but was moved back to the more physically demanding work.

Claimant initially sought treatment for his upper extremity symptoms at the emergency department of Mt. Carmel Medical Center on June 8, 2006. Although the record is unclear, it appears claimant had an in-person discussion with "Big John" shortly before going to the hospital. According to claimant, he was told to "do what you have to do" in response to his complaints of hand and arm symptoms and his comment that he needed to see a doctor.[4]

Claimant underwent x-rays of his hands at Mt. Carmel and was treated with an injection. Claimant was provided with a slip of paper which referred to carpal tunnel. Claimant does not recall what other information was on the paper. Claimant testified he

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[2] Cl. Depo. (Dec. 6, 2006) at 9.

[3] "Big John" is also referred to in the record as "John Hightland." R.H. by Depo. at 62.

[4] R.H. by Depo. at 62.

probably showed the paper to respondent. Claimant did not testify he was given specific light-duty restrictions, but was told at the hospital to "take it easy."[5]

Claimant sought medical treatment on his own with his personal heath care provider, Dr. Rodney Odgers, who prescribed medication and physical therapy. Dr. Odgers referred claimant to Dr. Misasi, from whom claimant received injections.

On September 5, 2007, claimant was first seen by Dr. Kevin Mosier, who became claimant's authorized treating physician pursuant to a preliminary hearing order. Dr. Mosier recommended bilateral carpal tunnel release surgeries. The doctor felt the bilateral carpal tunnel syndrome was caused by claimant's work. On December 23, 2008, claimant underwent a right carpal tunnel release and on April 2, 2009, Dr. Mosier performed the same procedure on the left.

Dr. Mosier found claimant had reached maximum medical improvement in August 2009. This exchange occurred at Dr. Mosier's deposition:

> Q. Okay. Since he has seen you, there has been a diagnosis of triggering of the middle finger of each hand, in particular some synovitis over the A1 pulley. Are you familiar with that type of an orthopedic diagnosis?
>
> A. Yes.
>
> Q. During the course of treatment of Mr. Lindsay, did he ever have those symptoms that presented while you were examining him?
>
> A. No.
>
> Q. There has also been a diagnosis of cubital tunnel disorder. Are you familiar with that diagnosis as well?
>
> A. Yes.
>
> Q. During the time that you examined him, did you find that diagnosis to be present?
>
> A. No.[6]

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[5] R.H. by Depo. at 64.

[6] Mosier Depo. at 10.

Dr. Mosier opined claimant sustained a 3% functional impairment to each upper extremity which combine for a 4% whole body functional impairment based upon the AMA *Guides*.[7] The doctor recommended claimant limit repetitive hand motion.

Dr. Kenneth Trinidad, an osteopathic physician board certified in internal medicine, evaluated claimant on October 26, 2009, at the request of claimant's counsel. The doctor reviewed claimant's medical records, took a history and performed a physical examination. Dr. Trinidad diagnosed bilateral carpal tunnel syndrome, bilateral tenosynovitis with triggering of the right and left middle fingers, and status post bilateral carpal tunnel release surgeries. The doctor opined that claimant's diagnoses resulted from cumulative repetitive trauma injuries to his hands and wrists as of his last day worked on June 22, 2006. Dr. Trinidad recommended a referral to an orthopedic hand specialist for a second opinion regarding additional treatment. Dr. Trinidad also recommended additional physical therapy and repeat EMG testing, with the possibility of corticosteroid injections for the tenosynovitis in claimant's middle fingers. Dr. Tinidad opined claimant was temporary totally disabled from performing any work activities since June 22, 2006.

Dr. Trinidad testified:

> Q. Doctor, if the exposure to the repetitious activities at Randy Vilela was not three months, but it was as short as perhaps four to six weeks, would that change your opinion as to causation?
>
> A. No. If -- he described it as very forceful, strenuous work with his hands and arms. So even short periods of time can bring out nerve entrapment problems that -- so three months is not necessarily needed for that to -- for causation. Shorter periods of time certainly can cause the problem.
>
> Q. Okay. So it would not change your opinion if it was a shorter period of time?
>
> A. No.
>
> Q. No, you're agreeing with my statement? We had a double negative in there. If it was a shorter work period of time, four to six weeks, it would not change your opinion; correct?
>
> A. Correct.[8]

Dr. Trinidad saw claimant again on August 28, 2012. He reviewed updated medical records, took a history and performed a physical examination. Dr. Trinidad diagnosed: (1)

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[7] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[8] Trinidad Depo. (Aug. 15, 2012) at 9-10.

cumulative trauma injuries to both hands with EMG documented carpal tunnel syndrome; (2) post surgical intervention; (3) bilateral tenosynovitis in the middle fingers; and (4) ulnar nerve entrapment at the elbows due to overuse. The doctor opined that claimant's work was the origin of his condition. Dr. Trinidad testified that it is common to develop tenosynovitis or trigger fingers in the hand after having carpal tunnel surgery.

Based upon the AMA *Guides*, Dr. Trinidad rated claimant's moderate to severe carpal tunnel syndrome at 30% impairment to each upper extremity. The 30% ratings were due to persistent irritation of the median nerve, sensory changes, loss of fine motor function in the digits and loss of grip strength. Dr. Trinidad also provided a 20% impairment to left arm and a 10% to the right arm due to ulnar nerve compression at the elbows. The left upper extremity ratings (30% & 20%) combine under the AMA *Guides* to 44% of that extremity. The right upper extremity ratings (30% & 10%) combine to 37% of that extremity.

Dr. Trinidad testified that due to claimant's accidental injuries, he is permanently and totally disabled from engaging in any substantial gainful employment. Dr. Trinidad imposed permanent restrictions of no lifting greater than 20 pounds and no repetitive work with his hands.

Dr. David Wong, a board certified orthopedic surgeon, evaluated claimant on January 14, 2010, at the ALJ's request. The doctor reviewed claimant's medical records, took a history and performed a physical examination. Dr. Wong diagnosed bilateral carpal tunnel syndrome and bilateral trigger fingers. Dr. Wong opined claimant was at maximum medical improvement for his bilateral upper extremities and that claimant's trigger fingers were not work related. Dr. Wong placed no permanent restrictions on claimant's physical activities. Dr. Wong found no clinical indications claimant sustained ulnar nerve entrapment at the elbows.

Dr. Wong rated claimant's upper extremities at 5% to each extremity, based on, the doctor thought, the AMA *Guides*, 5th edition. His narrative report dated January 14, 2010, did not specify which edition of the AMA *Guides* he used in arriving at claimant's impairment ratings.

Dr. Pedro Murati, a board certified independent medical examiner, evaluated claimant on June 3, 2010, at the request of claimant's counsel. The doctor is also certified in physical medicine and rehabilitation and electrodiagnostic medicine. Dr. Murati reviewed medical records, took a history and performed a physical examination. Claimant was diagnosed with bilateral carpal tunnel syndrome, left cubital tunnel syndrome and myofascial pain syndrome of the cervical spine.

Dr. Murati opined claimant's diagnoses were a direct result of his work-related injury of June 22, 2006. However, Dr. Murati testified:

Q. How does one get carpal tunnel syndrome?

A. Well, usually from repetitive traumas, vibratory things like a jackhammer, things like that.

Q. Do you know how long it takes for an individual to get carpal tunnel syndrome, or does that differ?

A. Some people never get it and some people get it within weeks.

Q. If someone testified he was having problems on the first day of employment, would that lead you to believe carpal tunnel was pre-existing?

A. It would point towards that direction, yes.[9]

Dr. Murati recommended claimant be treated conservatively.

Based on the AMA *Guides*, Dr. Murati provided the following impairment ratings:

Body Part Injured	% of Disability	Combined % for extremities	Whole Body Conversion
right carpal tunnel syndrome	10% RUE	19% RUE	11%
right cubital tunnel syndrome	10% RUE		
left carpal tunnel syndrome	10% LUE	19% LUE	11%
left cubital tunnel syndrome	10% LUE		
myofascial pain syndrome affecting the cervical paraspinal muscles.			5%
Total whole body impairment			**25%**

As of September 16, 2010, Dr. Murati imposed the following permanent restrictions based upon an 8-hour work day:

- no occasional lifting, carrying, pushing, or pulling greater than 35 pounds, 20 pounds frequently;
- no heavy repetitive grasping or grabbing and no performing work above shoulder height greater than 35 pounds;
- no crawling, no climbing ladders;

[9] Murati Depo. at 42.

- no repetitive grasping or grabbing greater than 35 pounds occasionally; and

- no frequent repetitive use of hand controls greater than 20 pounds.

Dr. Murati reviewed the list of claimant's former work tasks prepared by vocational rehabilitation counselor Karen Terrill and concluded claimant could no longer perform 36 of the 44 tasks for an 82% task loss. Claimant was not working and therefore had a 100% wage loss.

Dr. Murati opined claimant was permanently and totally disabled from engaging in any substantial gainful employment.

At the request of claimant's counsel, Ms. Terrill conducted interviews with claimant on June 22, 2010, November 8, 2011, November 10, 2011, February 28, 2012, and February 29, 2012. She prepared a task list of 44 non-duplicated tasks claimant performed in the 15-year period before his injury. At the time of the interviews, claimant was not working. Ms. Terrill opined that claimant is realistically unemployable in the open labor market.

At the request of the Fund's attorney, Steve Benjamin, a vocational rehabilitation consultant, conducted interviews with claimant on December 12, 2011, and August 8, 2012. Mr. Benjamin prepared a list of 45 non-duplicated work tasks claimant performed in the 15-years before his injury. At the time of the interviews, claimant was not working. Mr. Benjamin opined that claimant was capable of earning $342.32 per week, based upon an hourly rate of approximately $8.55 per hour for 40 hours per week.

Claimant's current complaints consisted of numbness and tingling in his hands and elbows as well as triggering in the middle fingers of both hands. Claimant felt the trigger fingers and elbows symptoms were caused by his work for respondent. Claimant thought he was unable to work because of the pain in both of his hands, arms and elbows.

PRINCIPLES OF LAW AND ANALYSIS

The Board finds that Continental Western is a party to this claim and, as such, is entitled to meaningful notice and a reasonable opportunity to be heard and present evidence. Continental Western was not afforded notice and an opportunity to be heard before the ALJ. The Board concludes, albeit reluctantly, that the Award Upon Remand must be vacated and the claim again remanded to Judge Avery with directions as detailed below. The bases for the Board's findings and conclusions are:

1. The constitutional requirements of due process are applicable to proceedings held before an administrative body acting in a quasi-judicial capacity.[10] The Kansas Supreme Court has recognized in numerous cases that the right to cross-examine witnesses testifying at administrative hearings of a quasi-judicial character is an important requirement of due process.[11]

In *Adams*[12], the Kansas Supreme Court held:

> In 73 C.J.S., Public Administrative Bodies and Procedure, § 132, pp. 456-458, we find the essential elements of an administrative hearing summed up in this way:
>
> 'An administrative hearing, particularly where the proceedings are judicial or quasi-judicial, must be fair, or as it is frequently stated, full and fair, fair and adequate, or fair and open. The right to a full hearing includes a reasonable opportunity to know the claims of the opposing party and to meet them. In order that an administrative hearing be fair, there must be adequate notice of the issues, and the issues must be clearly defined. All parties must be apprised of the evidence, so that they may test, explain, or rebut it. They must be given an opportunity to cross-examine witnesses and to present evidence, including rebuttal evidence, and the administrative body must decide on the basis of the evidence. . . .'
>
> The requirements of an administrative hearing of a judicial or quasi-judicial character are phrased in this language in 2 Am. Jur.2d, Administrative Law, § 412, p. 222:
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> '. . . A hearing before an administrative agency exercising judicial, quasi-judicial, or adjudicatory powers must be fair, open, and impartial, and if such a hearing has been denied, the administrative action is void. . . .'

The essential elements of due process of law in any judicial hearing are notice and an opportunity to be heard and defend in an orderly proceeding adapted to the nature of the case.[13] To satisfy due process, notice must be reasonably calculated, under all of the circumstances, to apprise the interested parties of the pendency of an action and to afford

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[10] *Neeley v. Board of Trustees, Policemen's & Firemen's Retirement System*, 205 Kan. 780, 784, 473 P.2d 72 (1970); *Saffer v. Star Construction, Inc.*, No. 1,030,669, 2009 WL 3191382 (Kan. WCAB Sep. 30, 2009); *Eubank v. State of Kansas*, No. 1,042,622, 2009 WL 2480261 (Kan. WCAB Jul. 15, 2009).

[11] *Wulfkuhle v. Kansas Dept. of Revenue*, 234 Kan. 241, 671 P.2d 547 (1983).

[12] *Adams v. Marshall*, 212 Kan. 595, 601-602, 512 P.2d 365 (1973).

[13] *Collins v. Kansas Milling Co.*, 207 Kan. 617, 485 P.2d 1343 (1971).

the parties an opportunity to present any objections.[14] A lack of notice of a hearing is a denial of due process.[15]

2. Apart from the constitutional requirements of due process, the Workers Compensation Act itself requires that the parties to a claim be afforded a reasonable opportunity to be heard and present evidence. K.S.A. 44-523(a) provides in part:

> The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give **the parties** reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality. (Emphasis supplied.)

This provision is consistent with other parts of the Act which grant to, not only claimants and employers, but also insurance carriers, the right to a reasonable opportunity to be heard and present evidence as well as certain obligations. We pause to note that individual provisions of the Act are not to be read in isolation. We must give effect, if possible, to the entire Act and every part thereof. To this end, it is the duty of the Court, as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible.[16]

Under K.S.A. 44-534(a), an insurance carrier may file an application for hearing with the Director. The last sentence of K.S.A. 44-534(a) requires all parties to have at least 20 days notice before the ALJ hears evidence and makes findings. K.S.A. 44-551(i)(1) allows any interested party to request review by the Board of final orders, modifications of awards, and in some circumstances, preliminary hearing orders. Previous Board decisions have permitted insurance carriers to appeal awards where the issue is date of accident and which insurance carrier had coverage.[17]

Under K.S.A. 44-512a and 512b insurance carriers as well as respondents may be assessed penalties when compensation is not paid when due or is not paid prior to an award without just cause. K.S.A. 44-528(a) allows an insurance carrier to request review and modification of an award.

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[14] *Johnson v. Brooks Plumbing, LLC.*, 281 Kan. 1212, 135 P.3d 1203 (2006).

[15] *Crease v. Vezers Precision Industrial Constructors International, Inc.*, No. 1,035,775, 2007 WL 4662039 (Kan. WCAB Dec. 7, 2007).

[16] *KPERS v. Reimer & Koger Assocs., Inc.*, 262 Kan. 635, 941 P.2d 1321 (1997).

[17] See *Diaz v. Quikrete Co., Inc.*, No. 1,056,994, 2013 WL 6382906 (Kan. WCAB Nov. 26, 2013).

3. Insurance carriers are parties to workers compensation claims.[18] As noted in *Diaz*,[19] employers in Kansas are required to secure workers compensation coverage, by purchasing insurance, qualifying as self-insured employers, or qualifying as members of an approved group-funded pool. Most attorneys who represent respondents are in fact hired by the respondent's workers compensation carrier. Workers compensation insurance carriers are an integral part of the workers compensation system.

K.S.A. 44-559 provides that an insurance carrier is a party to all workers compensation proceedings:

> Every policy of insurance against liability under this act shall be in accordance with the provisions of this act and shall be in a form approved by the commissioner of insurance. Such policy shall contain an agreement that the insurer accepts all of the provisions of this act, that the same may be enforced by any person entitled to any rights under this act as well as by the employer, that **the insurer shall be a party to all** agreements **or proceedings under this act**. and his appearance may be entered therein and jurisdiction over his person may be obtained as in this act provided, and such covenants shall be enforceable notwithstanding any default of the employer. (Emphasis supplied.)

4. Insofar as the record reflects, Continental Western received no written demand or notice of intent. It received no notice from the Division that an application for hearing or application for preliminary hearing had been filed. It received no notice of the prehearing settlement conference. It received no notice of the regular hearing or any other hearing. It received no notice of any of the numerous depositions taken in this claim, nor did it receive the original, April 2, 2013 Award. Continental Western did not receive the Fund's application for board review and it did not receive the motion of the parties to remand the claim to the ALJ. It did not receive the Board's Order remanding the claim to the ALJ.

At some point after the Board's Order on Remand and counsel's entry of appearance for Continental Western on June 7, 2013, Continental Western was, for the first time, made aware that a proceeding affecting its interests was pending before the Division; that the claim had been tried and submitted; and that an Award had been entered for a date of accident apparently during its period of coverage for a permanent total disability in the aggregate amount of $125,000. Less than a week following the entry of appearance by Continental Western's counsel, on June 13, 2013, Continental Western's counsel filed a Motion to Reopen Evidentiary Record requesting a reasonable opportunity to be heard and present evidence. Despite a request that a hearing be held on the Motion, the ALJ did not set the Motion for hearing. Instead the Judge entered the Award on Remand the same day as the Motion to Reopen Evidentiary Record was filed. The Award

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[18] See *Helms v. Tollie Freightways, Inc.*, 20 Kan. App. 2d 548, 889 P.2d 1151 (1995).

[19] *Diaz*, supra at 4.

on Remand added Continental Western as a party and assessed the entire Award against Continental Western. The very next day, June 14, 2013, the ALJ entered an Order denying Continental Western's Motion to Reopen Evidentiary Record.

In short, Continental Western received no meaningful notice in the claim and by the time it became aware that this proceeding was pending, the claim had been completely tried and an Award entered. By the time Continental Western retained counsel, its attorney entered his appearance, and a request was made for an opportunity to be heard, the Award on Remand had been entered finding the date of claimant's accident was apparently in its coverage. The Award on Remand was entered without allowing Continental Western an opportunity to be heard or present evidence. Continental Western was not even allowed a hearing on the Motion to Reopen Evidentiary Record, despite its request for a hearing on the Motion. Continental Western was apparently not even allowed to place into evidence its dates of coverage.

5. The cases of *Landes*,[20] *Lott-Edwards*,[21] and *Kimbrough*[22] have been cited to support the proposition that an insurance carrier has no separate right of procedural due process. The Kansas Supreme Court in *Landes*, relying on K.S.A. 44-559, quoted above, and what is now K.S.A. 40-2212, found that "notice to the employer is notice to the insurance carrier."[23] K.S.A. 40-2212 states, in part:

> Every policy issued by any insurance corporation, association or organization to assure the payment of compensation, under the workmen's compensation act, shall contain a clause providing that between any employer and the insurer, notice to and knowledge of the occurrence of injury or death on the part of the insured shall be notice and knowledge on the part of the insurer; and jurisdiction of the insured shall be jurisdiction of the insurer and the insurer shall be bound by every agreement, adjudgment, award, or judgment rendered against the insured. . . .

This provision does not refer to due process, nor does it refer to any party's right to be heard and present evidence. What this provision does concern is notice to and knowledge to the employer of the occurrence of injury or death and notice to and knowledge to the insurer of the occurrence of injury or death. K.S.A. 40-2212 does not say insurance carriers are not entitled to procedural due process, nor does any other part of the Act state that insurance carriers are without a right to be heard.

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[20] *Landes v. Smith*, 189 Kan. 229, 368 P.2d 302 (1962).

[21] *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

[22] *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

[23] *Landes*, 189 Kan. at 235.

The plain meaning of K.S.A. 40-2212 is that the notice required by K.S.A. 44-520 and the written claim requirement of K.S.A. 44-520a[24] must be provided to the employer and that the insurance carrier has no separate right to such notice and written claim. The Courts in *Lott-Edwards* and *Kimbrough*, in stating their holdings, make specific reference to the notice and written claim statutes.[25]

Landes, *Lott-Edwards* and *Kimbrough* were decided before *Bergstrom*,[26] in which the Kansas Supreme Court held:

> When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).

The statutory provisions discussed above are plain and unambiguous. Although an insurance carrier is bound when notice and written claim, as required by K.S.A. 44-520 and 44-520a, are provided to the employer, an insurance carrier is not entirely deprived of meaningful notice of proceedings involving its interests and an opportunity to be heard. K.S.A. 40-2212 does not provide otherwise. The various provisions of the Act discussed above demonstrate that the insurance carrier is a party to a claim and as such is entitled to a reasonable opportunity to be heard and present evidence.

6. As noted above, the Board is compelled under the circumstances of this claim to reverse the ALJ's Order, vacate the Award on Remand, and again remand the claim to the ALJ to afford Continental Western a reasonable opportunity to be heard and present evidence. The Board takes these actions reluctantly because it will delay any right claimant has to receive benefits under the Act. In addition, further hearings or depositions will result in more costs to all parties. Such delays are to be avoided according to a long line of precedent. As noted in *Diaz*[27]:

> The Workmen's Compensation Act has as its primary purpose an expeditious award of compensation in favor of an injured employee against all persons who may be liable therefor. The Act does not contemplate that such proceedings should be hampered or delayed by the adjudication of collateral issues relating to degrees of liability of the parties made responsible by the Act for the

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[24] K.S.A. 44-520a was repealed effective May 15, 2011.

[25] *Lott-Edwards,* 27 Kan. App. 2d at 696-97; *Kimbrough*, 276 Kan. at 857.

[26] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[27] *Diaz*, supra at 10-11.

> payment of compensation. Questions of contractual obligations or even equitable considerations may well be involved between the responsible parties which are of no concern to the injured employee. If such questions are involved, they should be resolved by a court in an independent proceeding in which the employee should not be required to participate.[28]
>
> The claimants in this, or any other, workmen's compensation appeal should not be required to stand by while the employer and the insurance carrier settle their personal disputes with respect to such matters.[29]
>
> The present action presents a graphic illustration of the hardship which may confront a claimant where insurance carriers are permitted to litigate, during the compensation process, claims and equities existing between themselves. . . .These are adversities which a claimant should not be forced to undergo. While we recognize the right of insurance carriers to be protected in their legal rights and to engage in litigation when disputes over their respective liabilities arise between them, yet their quarrels should not be resolved at the expense of an injured workman.[30]
>
> [W]e agree generally with the notion expressed by the ALJ and in the case law that insurance carriers should not litigate disputes about their respective liabilities for the compensation awarded to an injured worker in the compensation proceedings. Instead, these matters should be decided in separate proceedings between the carriers brought for such purposes and outside the Board's jurisdiction.[31]

A principle dispute in this claim is what date of accident is applicable to claimant's series of repetitive traumas under K.S.A. 44-508(d). The parties clearly did not stipulate to the date of accident[32] and it was therefore well within the jurisdiction of the ALJ to make a finding on that issue. The determination of the proper date of accident was not a collateral issue, nor did it constitute a mere quarrel between the insurance carriers. Much depends on the date of accident other than which carrier was on the risk, if any, when the accident occurred. The date of accident generally controls which law applies to the claim.[33] The

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[28] *Hobelman v. Mel Krebs Construction Co.*, 188 Kan. 825, 831, 366 P.2d 270 (1961).

[29] *Landes*, supra at 236.

[30] *Kuhn v. Grant County,* 201 Kan. 163, 171-72, 439 P.2d 155 (1968).

[31] *Mitchell v. Petsmart, Inc.*, 291 Kan. 153, 174, 239 P.3d 51 (2010).

[32] R.H. Trans. at 6.

[33] K.S.A. 44-505(c).

date of accident controls the maximum compensation rate and medical mileage rate applicable to the claim.[34]

Accordingly, when the parties do not stipulate to the date of accident, the ALJ is obliged to make a finding on that issue and such finding affects the interests of all parties in the claim, not just the insurance carriers. Moreover, the liability, if any, of the Fund, was an issue in this claim. Under K.S.A. 44-532a(a), the ALJ was required to address whether respondent was uninsured and financially unable to pay compensation when the accident occurred.

The ALJ observed that "[t]he defenses of the employer have been represented by counsel throughout the litigation process leading to the issuance of an award, and therefore the insurance carrier has no additional interest to defend. In addition the final award and its remanded version has already been issued by the Court."[35] However, the notion that Nationwide, the Fund, and respondent vigorously defended the claim and thereby fully protected the interests of Continental Western ignores the simple fact that the interests of Continental Western and those of the other parties are not one and the same. Continental Western is only responsible for claims arising during its period of coverage, not for accidental injuries arising before its coverage began or after its coverage ended. Before being ordered to pay $125,000, fundamental fairness requires that it be afforded reasonable notice and an opportunity to be heard.

CONCLUSIONS OF LAW

Since the date of accident affects the rights of all parties, then all parties must have notice of proceedings in which their rights and obligations are at stake and a reasonable opportunity to be heard and present evidence. Since Continental Western was provided no notice of any proceeding and was denied the opportunity to be heard and present evidence, the Order denying Continental Western's Motion to Reopen Record is reversed. The Award on Remand is vacated and the claim is remanded to the ALJ with directions to insure that Continental Western is notified of all future proceedings and is given an opportunity to be heard, present evidence and cross-examine witnesses. All other issues are moot.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[36] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

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[34] See K.S.A 44-510c(b)(1); K.S.A. 44-510h(a); K.A.R. 51-9-11.

[35] Order denying Continental Western's Motion to Reopen Evidentiary Record (June 14, 2013) at 2.

[36] K.S.A. 44-555c(k).

AWARD

WHEREFORE, it is the Board's decision that the June 14, 2013 Order denying Continental Western's Motion to Reopen Evidentiary Record is reversed; the June 13, 2013 Award Upon Remand is vacated; and the claim is remanded to the ALJ with directions to insure Continental Western is notified of all future proceedings and is given an opportunity to be heard, present evidence and cross-examine witnesses.

The Appeals Board does not retain jurisdiction of this claim. This Order is not a final order but is interlocutory in nature.

IT IS SO ORDERED.

Dated this _____ day of June, 2014.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

DISSENT

The undersigned Board Members would reluctantly uphold the judgment against Continental Western.

As an initial matter, we dissenters would have greatly preferred for Continental Western to be entitled to participate meaningfully in these proceedings. The undersigned Board Members would find Continental Western was not afforded the due process it was entitled under the law. Without question, we agree with the Board majority that Continental

Western was not given notice of claim or any hearings or depositions and therefore not afforded due process.

All this being said, the Board is duty bound to follow binding precedent.[37] *Lott-Edwards*[38] and *Kimbrough*[39] indicate it is the employer that is entitled due process and the insurance company has no separate right of due process.

In *Lott-Edwards*,[40] Americold and its workers compensation insurance carriers, National Union Fire Insurance Company of New York (National Union) and Travelers Property Casualty (Travelers), appealed a final award of benefits to Lott-Edwards by the Board. The Board found Travelers responsible for permanent total disability benefits awarded because Lott-Edwards' date of accident, March 10, 1995, was within Travelers' period of coverage. The date of accident was based on a legal fiction that it occurred on a single date, even though Lott-Edwards' repetitive injury occurred over time. Travelers argued its due process rights were violated because its attorney was denied the opportunity to confront witnesses who had testified before Travelers became involved in the case. The Kansas Court of Appeals held:

> The law does not favor Travelers' argument. It is the employer, Americold, that is entitled to notice and receipt of a written claim, not its insurance company. See K.S.A. 44-520; K.S.A. 44-520a. It is the employer that must be given proper notice and an opportunity to be heard and defend against a claim; the insurance company has no separate right of procedural due process flowing from provisions of the Workers Compensation Act. See *Landes v. Smith*, 189 Kan. 229, 235, 368 P.2d 302 (1962). Throughout this proceeding the interests of Americold have been vigorously defended and there can be no credible claim that the employer's due process rights have been violated. We conclude Travelers' claim is without legal merit.[41]

As noted in the above paragraph, *Lott-Edwards* cited *Landes*[42] for the proposition that an insurance carrier has no separate right of procedural due process. In *Landes*, an insurance carrier complained that it was not afforded notice of a hearing. The holding in *Landes* was based on what are now K.S.A. 40-2212 and K.S.A. 44-559. *Landes* noted an

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[37] See *Gadberry v. R. L. Polk & Co.*, 25 Kan. App. 2d 800, 808, 975 P.2d 807 (1998).

[38] *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 697, 6 P.3d 947 (2000).

[39] *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 857, 79 P.3d 1289 (2003).

[40] *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

[41] *Id.* at 696-97.

[42] *Landes v. Smith*, 189 Kan. 229, 235-36, 368 P.2d 302 (1962).

insurance company that writes a policy for Kansas coverage is bound by any judgment against its insured employer and "notice to the employer of the hearing is notice to the insurance carrier."[43] K.S.A. 40-2212 states, in part:

> Every policy issued by any insurance corporation, association or organization to assure the payment of compensation, under the workmen's compensation act, shall contain a clause providing that between any employer and the insurer, notice to and knowledge of the occurrence of injury or death on the part of the insured shall be notice and knowledge on the part of the insurer; and jurisdiction of the insured shall be jurisdiction of the insurer and the insurer shall be bound by every agreement, adjudgment, award, or judgment rendered against the insured. . . .

K.S.A. 44-559 provides that an insurance carrier is a party to all workers compensation proceedings:

> Every policy of insurance against liability under this act shall be in accordance with the provisions of this act and shall be in a form approved by the commissioner of insurance. Such policy shall contain an agreement that the insurer accepts all of the provisions of this act, that the same may be enforced by any person entitled to any rights under this act as well as by the employer, that the insurer shall be a party to all agreements or proceedings under this act, and his appearance may be entered therein and jurisdiction over his person may be obtained as in this act provided, and such covenants shall be enforceable notwithstanding any default of the employer.

In *Kimbrough*, such claimant's date of accident was determined to be her last day worked. As such, liability befell the insurance carrier on the risk for such date of accident. The Kansas Supreme Court addressed the argument of the employer, the University of Kansas Medical Center:

> KUMC further argues that using the last day worked before the hearing could prejudice the employer's insurance carrier if the insurance carrier did not insure the employer when the claimant first made the claim. This argument has no merit. The employer is entitled to notice and receipt of a written claim, not the insurance carrier. K.S.A. 44-520; K.S.A. 44-520a. "[T]he insurance carrier has no separate right of procedural due process flowing from provisions of the Workers Compensation Act." *Lott-Edwards*, 27 Kan. App. 2d at 697.[44]

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[43] *Id.* at 235.

[44] *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 857, 79 P.3d 1289 (2003).

Landes, *Lott-Edwards* and *Kimbrough* all seem to say an insurance carrier cannot rightfully assert it was denied due process when the respondent was aware of the claim.[45] If jurisdiction over the insured is jurisdiction over the insurer, and the insurance carrier has no separate right to due process under the law, Continental Western's argument regarding due process is moot. However, it is worth pointing out that neither K.S.A. 40-2212 nor K.S.A. 44-559 actually state that an insurance carrier has no due process rights. The law is supposed to be applied as literally written.[46] Still, we must follow this appellate precedent.

The Board majority's decision will delay claimant's entitlement, if any, to workers compensation benefits. Holding up claimant's award to allow for a likely dispute between insurance companies is contrary to a long line of precedent:

- The [Workers] Compensation Act has as its primary purpose an expeditious award of compensation in favor of an injured employee against all persons who may be liable therefor. The Act does not contemplate that such proceedings should be hampered or delayed by the adjudication of collateral issues relating to degrees of liability of the parties made responsible by the Act for the payment of compensation. Questions of contractual obligations or even equitable considerations may well be involved between the responsible parties which are of no concern to the injured employee. If such questions are involved, they should be resolved by a court in an independent proceeding in which the employee should not be required to participate.[47]

- The claimants in this, or any other, workmen's compensation appeal should not be required to stand by while the employer and the insurance carrier settle their personal disputes with respect to such matters.[48]

- The present action presents a graphic illustration of the hardship which may confront a claimant where insurance carriers are permitted to litigate, during the compensation process, claims and equities existing between themselves. . . . These are adversities which a claimant should not be forced to undergo. While we recognize the right of insurance carriers to be protected in their legal rights and to engage in litigation when disputes over their respective liabilities arise between them, yet their quarrels should not be resolved at the expense of an injured workman.[49]

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[45] It is possible the holdings of these cases might be different based on strict construction.

[46] See *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

[47] *Hobelman v. Krebs Construction Co.*, 188 Kan. 825, 831, 366 P.2d 270 (1961).

[48] *Landes v. Smith*, 189 Kan. 229, 236, 368 P.2d 302 (1962).

[49] *Kuhn v. Grant County*, 201 Kan. 163, 171-72, 439 P.2d 155 (1968).

- [W]e agree generally with the notion expressed by the ALJ and in the case law that insurance carriers should not litigate disputes about their respective liabilities for the compensation awarded to an injured worker in the compensation proceedings. Instead, these matters should be decided in separate proceedings between the carriers brought for such purposes and outside the Board's jurisdiction.[50]

In sum, the undersigned Board Members would prefer to remand the matter for Continental Western to participate in the case based on lack of due process, but conclude appellate precedent precludes such result.

_____
BOARD MEMBER

_____
BOARD MEMBER

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[50] *Mitchell v. Petsmart, Inc.*, 291 Kan. 153, 174, 239 P.3d 51 (2010).